T.E. Elevator Corp. of Connecticut and Terrence Euell d/b/a Euell Elevator Co., Inc. *and* International Union of Elevator Constructors, Local 91. Case 39-CA-1374

29 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 11 October 1983 Administrative Law Judge Frank H. Itkin issued the attached decision. The General Counsel and the Charging Party Union filed exceptions and supporting briefs, and Respondent filed limited cross-exceptions and a brief supporting both those cross-exceptions and the judge's decision.[1] Respondent later submitted an answering brief to the General Counsel's and the Charging Party Union's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order.

The judge found that the Respondent Euell Elevator is not the alter ego of Respondent T.E. Elevator Corp. of Connecticut (T.E. Elevator) and thus did not, as alleged, violate Section 8(a)(5) of the Act by repudiating T.E. Elevator's collective-bargaining agreement with the Union. While we agree with the judge's determination of this issue, we do so for the further reasons that follow.

It is clear from the record evidence in this case, as the judge found, that Euell Elevator is not a disguised continuance of T.E. Elevator. Absent a disguised continuance, the Board generally has found alter ego status only where the two enterprises have "substantially identical" ownership, business purpose, management, supervision, customers, operation, and equipment.[4]

Here, the record shows that Euell Elevator and T.E. Elevator do not have substantially identical ownership. Whereas DeWitt Morrill, Eugene Tittmann, and Terrence Euell were equal shareholders of T.E. Elevator, Euell and his wife jointly own Euell Elevator. Thus, Morrill and Tittmann together owned two-thirds of T.E. Elevator, but have no interest in Euell Elevator. Although the business purpose of both companies is similar, we note that T.E. Elevator was engaged in installing elavators as well as performing elevator repairs. Euell stated at the hearing that Euell Elevator, by contrast, is performing only service and maintenance work on elevators. The record further discloses that Euell Elevator is managed solely by Terrence Euell. While Euell was generally responsible for T.E. Elevator's day-to-day operations, the judge found that Morrill and Tittmann participated in major decisions affecting the company, including the recognition of the Union, the opening and closing of a branch office, and the hiring of any new employees. Moreover, there is evidence that Morrill was directing T.E. Elevator's operations during the final month before it was dissolved. When Euell Elevator thereafter commenced operations, Terrence Euell admittedly solicited business from all 33 customers that T.E. Elevator had served. He was only successful, however, in acquiring service and maintenance contracts from 15 of these companies. He later obtained 13 new customers on his own. We also emphasize that the new operation does not use any equipment that T.E. Elevator formerly owned.

Thus, despite the fact that there are many similarities between these business enterprises, we conclude that Euell Elevator is not the alter ego of T.E. Elevator because it does not have "substantially identical" ownership, business purpose, management, customers, and equipment. We therefore shall adopt the judge's recommended Order.

[1] On 9 November 1983 the Respondent, relying on *Columbia Mfg. Corp. v. NLRB*, 715 F.2d 1409 (9th Cir. 1983), filed an application for attorneys' fees under the Equal Access to Justice Act. On 21 November 1983 the Respondent's EAJA application was rejected as premature.

Because of the apparent confusion in this and other cases with respect to when an application for attorneys' fees under the Equal Access to Justice Act may be filed, we deem it advisable to clarify this matter. Sec. 102.148 of the Board's Rules and Regulations provides that an application for an award under EAJA shall be filed "no later than 30 days after the entry of the Board's final Order. . . ." In cases in which an administrative law judge issues a decision on the merits and exceptions are filed under Sec. 102.46 of the Rules, the 30-day period for filing an application under EAJA begins with the date the Board issues its Decision and Order. If, on the other hand, no exceptions are filed to the judge's decision, the Board will issue an Order adopting the judge's decision and the 30-day period begins running from the date of the Order adopting.

Columbia Mfg. Corp., supra, relied on by the Respondent to file its EAJA application, is distinguishable. In *Columbia*, the judge, pursuant to the General Counsel's motion, issued an order dismissing the complaint under Sec. 102.27 of the Rules and Regulations. The judge made no ruling on the merits, and the case was not transferred to the Board, so that no order adopting was issued by the Board. Accordingly, under Sec. 102.27 of the Rules and Regulations, the 30-day period for filing an EAJA application commenced with the date the judge issued his order dismissing the complaint. See *Columbia Mfg. Corp.*, 265 NLRB 109 (1982).

[2] Since we are dismissing the complaint in this case, we find it unnecessary to pass on the Respondent's limited cross-exceptions to the judge's decision.

[3] Both the General Counsel and the Charging Party Union have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] See, e.g., *Chippewa Motor Freight*, 261 NLRB 455, 458 (1982).

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

DECISION

FRANK H. ITKIN, Administrative Law Judge: An unfair labor practice charge was filed in this case on October 15 and a complaint issued on November 26, 1982. A hearing was conducted in Fairfield and Stratford, Connecticut, on July 25 and 26, 1983.[1] Briefly, the General Counsel alleges that Respondent T.E. Elevator Corp. of Connecticut (T.E. Elevator) and Respondent Terrence Euell d/b/a Euell Elevator Co., Inc. (Euell Elevator) have engaged in "the same business enterprise with common management and supervision"; have "formulated and administered a common labor policy"; have used the "same operating license" and "facility"; have provided "services for the same customers"; have "interchanged personnel"; have "held themselves out to the public as a single integrated business enterprise"; and, therefore, are "alter egos" or a "single employer" under the National Labor Relations Act. The General Counsel also alleges that Respondent Euell Elevator "was established" by Respondent T.E. Elevator about January 20, 1982, and "has operated as a disguised continuation of T.E. Elevator." The General Counsel claims that Respondent Employer, about January 20, 1982, repudiated and refused to abide by its outstanding collective-bargaining agreement with Charging Party Union, in violation of Section 8(a)(5) and (1) of the Act. Respondent, in its answer, generally denies violating the Act as alleged and, in addition, asserts that the complaint is barred by Section 10(b) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Respondent Employer, T.E. Elevator and Euell Elevator, during the calendar year 1982, admittedly performed services valued in excess of $50,000 in States other than Connecticut. Respondent Employer is, on this record, an employer engaged in commerce as alleged. And Charging Party Union is admittedly a labor organization as alleged.

De Witt Morrill testified that, during early 1978, he was engaged in the "heating, ventilating and air-conditioning contracting and service business"; that he then met Terrence Euell who "was in a business that was analogous or parallel . . . the elevator service business . . ."; and that he, Morrill, and his partner, Eugene Tittmann, "put up the equity capital to start Respondent T.E. Elevator." Euell, at the time, was a stockholder in a company known as T. E. Elevator Co. of New York. The initial owners of Respondent T.E. Elevator were, according to Morrill, Tittmann, Morrill, and T.E. Elevator Co. of New York. Morrill and Tittmann each invested $15,000 in Respondent T.E. Elevator and T.E. Elevator Co. of New York, the Company in which Euell owned stock, contributed "tools, equipment and expertise." All three persons or entities then became equal shareholders in Respondent T.E. Elevator. (See G.C. Exh. 2.)

Later, in 1980, as Morrill further testified, Euell "acquired on his own name the ownership position of the New York Company" T.E. Elevator Company of New York. Consequently, the "three individual equal owners" of Respondent T.E. Elevator were then Morrill, Tittmann, and Euell (ibid.). Morrill also recalled that, during the course of the first year and a half of this operation, Respondent T.E. Elevator "borrowed" certain sums from Tittmann and Morrill. In addition, Respondent T.E. Elevator borrowed funds from a local bank. These loans were secured by promissory notes signed by "each of the three stockholders . . . with equal responsibility for repayment. . . ."

Morrill explained that Respondent T.E. Elevator was "to be an elevator maintenance and service company." Morrill asserted that neither he nor Tittmann had any "knowledge of the elevator business at that time." Accordingly, Euell "was the president and chief executive officer" of Respondent T.E. Elevator. Morrill and Tittmann assertedly learned, after the formation of T.E. Elevator, that the Company also "had embarked on the installation of elevators." According to Morrill, Euell made this determination and Morrill and Tittmann "were advised about [it] later." In short, Euell "ran the Company" from its creation in 1978 "until late 1980."[2]

Morrill next testified that he and Tittmann became aware of "some problem that T.E. Elevator" was having about late summer or early fall of 1980. Apparently, Internal Revenue Service was not receiving the taxes withheld from the employees of T.E. Elevator. And, as Morrill explained, "it became obvious that we were not earning the kind of money that we should be earning . . . As a consequence, a board of directors meeting was held, attended by, inter alia, Euell and Morrill; the financial "problem" was then discussed; and

> Mr. Euell . . . and I [Morrill] proceeded to meet with the IRS and with the Company's outside auditor to work out an arrangement whereby those taxes would be paid.

However, later, during December 1980, as Morrill further recalled,

> It became very much a matter of concern to Mr. Tittmann and me that the payables of the Company were running way in front of the receivables; that the operations were not being conducted at a profit; and the question had been under consideration for a

[1] The complaint, including the caption, was amended at the hearing.

[2] Morrill claimed that Euell signed "all the checks"; performed "all purchasing"; "dealt with customers"; and neither Morrill nor Tittmann had any "involvement with any of these matters." Morrill claimed that Euell handled the "firing and hiring of employees"; set "labor rates"; and set "fringe benefits for employees." In addition, when Respondent moved its offices in 1980, Euell handled this transaction and signed the new lease. Morrill also claimed that he had "no knowledge" when T.E. Elevator "first recognized" the Union.

month or two as to whether we should attempt to continue . . . in business or go out of the business.

Morrill further testified that, in January 1981, Morrill and Tittmann, on behalf of the board of directors of T.E. Elevator, "asked [Euell] to turn in his stock to us, and in return . . . we would relieve him of certain obligations." This request, made in writing on January 20, 1981, stated, in pertinent part as follows (G.C. Exh. 3):

> Accordingly, after long and sober analysis, we have decided that the best interests of the Company will be served by immediately terminating your relationship with it in its entirety. Because you are a stockholder, we have developed the following plan for carrying out your severance:
>
> 1. The Corporation will redeem your shares in return for relieving you from any obligation for its debts to the Union Trust Company, your share of this indebtedness is in excess of $7,300.00.
> 2. Your obligation as President of the Company for the unpaid withholding taxes due the Internal Revenue Service and past due amounts due for State Unemployment Compensation and Disability Insurance will be gradually eliminated by the Company, relieving you of your personal liability to the IRS in the amount of approximately $18,000 and $300.00 for the Connecticut obligations.
> 3. Severance pay will be provided at the rate of $450.00 per week through January 30, 1981, a total of $900.00.
> 4. The contract presently awaiting activation for the modernization of elevators at 300 South Broadway, Tarrytown, N.Y., will be abrogated immediately by T.E. Elevator Corporation of Connecticut. You hereby have our permission to take on this work yourself, totally independent of and with no liability attaching to T.E. Elevator Corporation of Connecticut.
> 5. Any debt owed by the Company to you, as evidenced by its promissory note, will be repaid to you at such time as the Company is financially able to reduce the indebtedness of all three of its personal lenders, with the amount owed you being paid from the total amount available for reduction of this debt in the proportion that the amount owed you bears to the total amount owed to all of the personal lenders.
> 6. You agree not to compete with T.E. Elevator Corporation of Connecticut in any way in Fairfield or New Haven Counties in Connecticut for a period of two years.
> 7. You will deliver to the Company your stock certificate for 50 shares of common stock, all books, records and commitments of whatever kind to or from third parties properly belonging to T.E. Elevator Corporation of Connecticut.
> 8. You hereby represent and agree that any such commitments or obligations not specified by you in making the delivery stated in item (7) above are your personal responsibility.
> 9. Your signature on this memorandum will serve as your acceptance of these terms.

Euell, however, refused to agree to or sign General Counsel's Exhibit 3, as quoted above. According to Morrill, Euell "threatened that if we put him out of business today, he would be in business tomorrow."

Thereafter, by letter dated February 2, 1981, Morrill and Tittmann, on behalf of the board of directors, notified Euell, in part as follows (G.C. Exh. 4):

> There has been no response from you in person, by telephone or through counsel in this time period, which has now expired. Accordingly, Mr. Tittmann and I, on advice of counsel, consider the January 20, 1981 memorandum to be null and void.
>
> Further, because of the manner in which you have seriously mismanaged the company—absenteeism, negligence, failure to follow up on new business opportunities and irresponsible behavior with respect to the company's financial affairs—Mr. Tittmann and I have concluded that the only viable course of action now is to dissolve the corporation.
>
> Consequently, in accordance with the By Laws and the Connecticut Corporation Statutes, we are calling special meetings of the Board of Directors and the Shareholders on Monday, February 9, at 9:00 a.m. in the office of Mr. George Aretakis, 126 Hoyt Street, Stamford, Connecticut. The sole purpose of this meetinq will be to vote the dissolution of the T.E. Elevator Corporation of Connecticut.

The dissolution meeting was held as scheduled on February 9, 1981, as recited above. Euell did not appear. And "by vote of the shareholders which represented a quorum, the Company was dissolved." As Morrill observed, "for all legal and practical purposes [Respondent T.E. Elevator] ceased to exist."

Morrill, on cross-examination, acknowledged that between January 20 and February 9, 1981, the "locks" on the door to T.E. Elevator's office were changed; this was a "joint decision" by, inter alia, Tillmann and Morrill; and, after January 20, 1981, Morrill continued to visit the office on a regular and frequent basis. Morrill, at the time, instructed the employees "to continue to come in to work" "for that week or maybe two at the most." Morrill, on redirect examination, also explained:

> There was a substantial amount of accounts receivable due [during this period]. . . . The Internal Revenue Service requested immediately a list of all accounts receivable and immediately slapped liens on all those accounts. . . . The IRS effectively blocked us out of any further contact with those accounts. . . .[3]

[3] Morrill noted that, following dissolution, he received "a deficiency notice from the landlord" of T.E. Elevator; he then "contacted the landlord's business agent and advised him that T.E. Elevator . . . was not occupying that space any longer" and "the occupant was Mr. Euell and that Mr. Euell would have to be responsible for the lease." The landlord subsequently executed a "release from the lease obligation"; Morrill

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Thomas Canino, purchasing agent for the city of Stamford, testified that T.E. Elevator had an elevator maintenance contract with the city; that the city received a notice of levy from Internal Revenue Service pertaining to T.E. Elevator about February 10, 1981; that Canino then "instructed the accounts payable department to stop payment and start in with the IRS"; and that, later, he also received from Euell a notice, reciting (G.C. Exh. 11):

> Euell Elevator Corp.
> 95 Morgan St.
> Stamford, Ct. 06095
> 324–0823
>
> Effective immediately, Euell Elevator Corp., with no interruption of service, will fulfill all service contracts of T.E. Elevator Corp. Please send all mail to above address.

Canino, however, refused to deal with Euell and his new Company (see G.C. Exh. 12). Canino explained: "Having now been notified that there was no more T.E. Elevator Corp., I advised Mr. Euell that we had no relationship with any newly formed Company." (Also see R. Exh. 1.)

Werner Valeur-Jensen, owner of Valeur Realty in Stamford, testified that certain of Realty's properties were serviced by T.E. Elevator under service contracts and that he principally dealt with Euell in connection with these transactions. (see G.C. Exhs. 13–16.) About January 2, 1981, Euell, on behalf of T.E. Elevator, sent Valeur-Jensen "new contracts." (See G.C. Exh. 20.) There was later "some change in the name or ownership of T.E. Elevator," however, as Valeur-Jensen explained,

> [I]t is not quite clear in my mind, but I have a vague recollection that Mr. Euell called me and said that there was either a reorganization or a move or the other. . . .

The "name had changed at some point." See "invoice" dated 2/19/81, to Werner Jensen from "Euell Elevator Co. 95 Morgan St., Stamford Connecticut" (G.C. Exh. 17) and "work slip" dated 3/24/81 from "Euell Elevator Co., Inc." (G.C. Exh. 19). (Cf. G.C. Exh. 18 a "work slip" dated 3/13/81, which shows the name "T.E. Elevator Corp.")

John DeRosa, business manager for Charging Party Union, identified the collective-bargaining contract between Respondent T.E. Elevator and his Union. (See G.C. Exh. 21.) This agreement, signed by Euell and DeRosa on July 19, 1978, was operative at all times pertinent to this proceeding. Euell, as recited, signed this agreement "for the Employer, T.E. Elevator Corp. of Conn." DeRosa recalled that, during the "existence of the agreement" G.C. Exh. 21), he principally dealt with Euell; DeRosa did "not deal with" Morrill or Tittmann. DeRosa also recalled that, about January 1981, T.E. Elevator "went out of business." DeRosa testified:

> The men called me up and said they were having trouble getting their paychecks. I went down there and spoke with some of the men . . . and spoke with Mr. Euell. . . I believe [Euell] told me he was going out of business.

Respondent Employer T.E. Elevator then "laid off the employees," "owing us [the Union] some pension and welfare" moneys, due under the contract.

DeRosa was questioned at length as to when he first learned that Euell was "still in business." DeRosa testified, in part as follows:

> Q. Did any thing come to your attention with regard to Mr. Euell's operating in Connecticut?
>
> A. Yes. In May, I believe, of 1982, one of the members saw Mr. Euell in Stamford, Connecticut on Summer Street, notified me, followed him to a job and then called me up and told me that he's in business and I notified our attorneys.
>
> . . . .
>
> Q. And did you find out anything more at that time about Mr. Euell's operations in May of '82?
>
> A. Yeah, I found out he was still in business and he still had some of the same customers.
>
> Q. Was that the first time you learned that he—
>
> A. That's the first time that I learned that he was still operating in the State of Connecticut.
>
> Q. You said that you called Mr. Euell back in early '81; is that right? You were unable to get to him. Did you make any further efforts?
>
> A. I went down, went down to his building and could never get in, the door was always locked.
>
> Q. And did you continue to call Mr. Euell throughout 1981 and 1982?
>
> A. I called Mr. Euell at least a dozen times and in 1982, I know I called him four or five times.
>
> Q. Did he return any of those calls?
>
> A. Never.
>
> Q. Did you leave messages?
>
> A. With an answering service, I believe, or his wife—one or the other.
>
> Q. And you said you weren't able to gain access to his office?
>
> A. No.
>
> Q. Was that at 95 Morgan Street?
>
> A. Right.

Elsewhere, DeRosa testified, in part as follows:

> Q. Well, when did you first hear that Mr. Euell, forgetting the particular name of the corporation, but that Mr. Euell was still doing business in the elevator maintenance and serving industry after February 1981?
>
> A. May of 1982.
>
> Q. Isn't it a fact that information came to you as early as May 1981 that Mr. Euell was still in this business?

"signed" the "release"; Euell apparently also "signed"; and "the lease payments became the responsiblity of Mr. Euell," or Euell Elevator Co. Thus, the lease of the premises known as 95 Morgan Street, previously occupied by Respondent T.E. Elevator, "was turned over to Mr. Euell." The nature of Euell's operation at that facility following T.E. Elevator's dissolution will be discussed further below.

A. I went down and could never get in touch with him. I called him, went down there.

Q. But this was May 1981 wasn't it, Mr. DeRosa?

A. It could have been.

. . . .

Q. Well, let me show you your affidavit, perhaps this will refresh your recollection. It reads, "In May 1981 I learned that Euell, through hearsay, was back in business and that he was using Mike Rusinak [contractor of record for T.E. with State of Conn. licensing Department] to do elevator repair. We filed a grievance on [May] 14, 1981 on this issue but the real issue was to try to collect our back contributions."

A. Right.

Q. Now, does that refresh your recollection about when you learned that Mr. Euell was continuing to do elevator repair and servicing work?

A. At that time I went down to his office, I couldn't get in his office, and I checked and checked and I couldn't—you know, there was nowhere I could establish that he was working.

Q. Now, when you went to his office to what address did you go?

A. 95 Morgan Street.

Q. And at that address was there a listing for a corporation doing elevator service and repair work?

A. Not that I recall, sir.

Q. Is there not a board at the entrance to 95 Morgan Street with wooden signs on it showing offices at that address?

A. There may be but I didn't see any, sir.

. . . .

Q. Well, when you went to the building did you ring the bell?

A. I went and I tried to gain access to the same door that in 1981, the time that I met him there, I went to that same door and the door was locked. In fact 90 percent of the time that door is locked.

Q. Did you see any sign on the door?

A. No, I didn't.

Q. Did you check to see if T.E. Elevator Corp. of Connecticut was still located there?

A. No, I didn't, sir.

Q. Did you go around to the front of the building?

A. No, I didn't, sir.

Q. Did you speak to anyone at that building? A superintendent or a janitor?

A. I spoke to a man in the lot once and he couldn't give me any information whatsoever.

Terrence Euell testified that he is president of Respondent Euell Elevator; that Euell Elevator began operations during early 1981; and that none of its employees were "formerly employed" by Respondent T.E. Elevator. Euell Elevator has the same address and telephone number as T.E. Elevator, however, "Euell Elevator Corp." is the named lessee of the 95 Morgan Street offices. (See G.C. Exh. 23.) "Euell Elevator Corp." was incorporated by the State of New York about March 11, 1981, and Terrence Euell and his wife Patricia are its sole or principal officers, directors, and stockholders. (See G.C. Exhs. 26(a) through 26(h).) Further, Respondent Euell Elevator admittedly continued some 15 service contracts which, prior to its formation, had been entered into by Respondent T.E. Elevator. (See G.C. Exhs. 24(a) through 24(r).) In addition, Respondent Euell Elevator entered into some 13 new service contracts as "Euell Elevator Corp." or "Euell Elevator Co., Inc." from "February 1981 to the present." (See G.C. Exhs. 25(a) through 25(n).) And, admittedly, some 18 customers of Respondent T.E. Elevator "did not continue with Euell Elevator Corp." (See G.C. Exh. 27.)

Euell testified that, while associated with Respondent T.E. Elevator, Tittmann and Morrill periodically met with him; "we decided" to sign a contract with the Union after a discussion; the opening of a new office and its closing were also a "mutual decision" after a discussion; Morrill even attempted "to make collections" on overdue accounts; and

> . . . before I [Euell] would hire a new employee, I would have to present to Mr. Tittmann and Mr. Morrill work programs, signed contracts, stating the work was in the near future and that the need for another man was warranted.

Tittmann and Morrill also participated in leasing vehicles for T.E. Elevator and in making additional financing arrangements. Further, Morrill, at some point, got involved in the T.E. Elevator day-to-day business operations including "dispatching the men."

Euell recalled how he was "terminated" by Morrill and Tittmann about January 20, 1981. He was instructed that his "services were no longer required [and] the key at the office would be changed." He then sought employment elsewhere and even applied for state unemployment compensation. He was later informed, during February 1981, that "T.E. Elevator Corp. of Conn. was abandoned and they were out of business." Euell then decided to "go back" and "form a new Company." He admittedly sent notices to "former customers" of Respondent T.E. Elevator, seeking their bussiness. (See G.C. Exh. 11.) He also sent the "former customers" notices which, in effect, disclaimed any "business relationship" between Euell Elevator and T.E. Elevator. (See R. Exh. 1.)

Euell generally claimed that in March or April 1981, "there would have been a sign in the place," "on the front door of the office" at 95 Morgan Street, "saying Euell Elevator," and this "would have been a stencil sign." Other signs identifying his new Company were apparently placed in front or outside the building; however, the dates when such signs were installed were unclear. (Cf. R. Exhs. 6 and 7.)[4]

[4] On cross-examination, Euell acknowledged that the front door to his offices, for Euell Elevator, was "locked" "unless" the "secretary . . . was there . . . otherwise, it's locked . . . ." Euell explained that his wife and a "part-time girl" have "been working in the office" from the inception of his Company. They, however, were not always present. Euell also explained that he has had telephone answering service "from the beginning." Euell, in addition, acknowledged that he, in effect, now uses the

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Discussion

The Supreme Court stated in *N.L.R.B. v. Burns Security Services*, 406 U.S. 272, 279, 280, 281 (1972), that, "It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer"; "It would be a wholly different case if the Board had determined that because [the new employer's] operational structure and practices differed from those of [the predecessor], the [particular] bargaining unit was no longer an appropriate one"; "Likewise, it would be different if [the new employer] had not hired employees already represented by a union certified as bargaining agent"; "But where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandate of Section 8(a)(5) and Section 9(a) by ordering the employer to bargain with the incumbent union." The Supreme Court, however, made it clear that "it does not follow from [the successor's or new employer's] duty to bargain that it was bound to observe the substantive terms of the collective bargaining contract the union had negotiated with" the predecessor employer "and to which [the successor] had in no way agreed."

And, in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 171 fn. 2 (1973), the Supreme Court upheld the principle and rationale announced earlier by the Board in *Perma Vinyl Corp.*, 164 NLRB 968 (1967), enfd. sub nom. *United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968),

> . . . that one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.

The Court sustained the Board's remedial authority to impose "joint and several liability" in such cases.

Later, in *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 259 fn. 5 (1974), the Supreme Court explained:

> It is important to emphasize that this is not a case where the successor corporation is the "alter ego" of the predecessor, where it is "merely a disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). Such cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management. In these circumstances, the courts have had little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor. See *Southport Petroleum Co. v. NLRB*, supra; *NLRB v. Herman Bros. Pet Supply*, 325 F.2d 68 (CA 6 1963); *NLRB v. Ozark Hardwood Co.*, 282 F. 2d 1 (CA 8 1960); *NLRB v. Lewis*, 246 F.2d 886 (CA 9 1957).

Cf. *Cagle's, Inc.*, 218 NLRB 603 (1975); *International Offset Corp.*, 210 NLRB 854, 865–867 (1974); *Fugazy Continental Corp.*, 265 NLRB 1301 (1982); and *Denzil S. Alkire v. NLRB*, 716 F.2d 1014 (4th Cir. 1983) (pending petition for rehearing); and cases cited.

In the instant case, the General Counsel does not contend that Respondent Euell Elevator is a successor employer under *Burns* or *Perma Vinyl*. Instead, General Counsel argues that Respondent Euell Elevator is an "alter ego" or "disguised continuance" of Respondent T.E. Elevator and, consequently, has violated Section 8(a)(5) and (1) of the Act by not complying with the outstanding collective-bargaining contract between T.E. Elevator and the Union. The credible and essentially uncontroverted evidence of record, recited above, does not support this assertion.

Thus, it is uncontroverted that Morrill and Tittmann owned two-thirds of the outstanding stock of Respondent T.E. Elevator, from its inception in 1977 or 1978 until its dissolution in early 1981. Euell ultimately acquired only a one-third stock interest in this entity. In late 1980 and early 1981, Morrill and Tittmann, displeased with the performance of Euell as "president and chief executive" of T.E. Elevator, "developed" a "plan" for "immediately terminating" his "relationship" and thereby effecting his "severance." This "plan" would require, inter alia, Euell "not to compete" with T.E. Elevator in the area for a 2-year period. Euell, however, refused to agree to the terms of this "plan." Morrill and Tittmann promptly changed the "locks" on the door to T.E. Elevator and, to some limited extent, attempted to continue operations of T.E. Elevator without Euell. Euell, as he credibly testified, sought employment elsewhere and even applied for and collected state unemployment compensation. Ultimately, Morrill and Tittmann dissolved T.E. Elevator. As Morrill acknowl-

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"same" state license or licensing arrangement to perform elevator work; this license had been used while he was associated with T.E. Elevator. Apparently, one Michael Rusinak possesses the particular license; Rusinak is now employed by Euell; "but at T.E. he was a partner in the New York operation." Rusinak holds no "position" in Euell Elevator. He was initially an officer of T.E. Elevator.

Much of the testimony detailed above is uncontroverted and is substantiated by undisputed documentary evidence. The testimony of Canino and Valeur-Jensen is thus undisputed and credible. There are, however, some conflicts between Morrill's recollection of the pertinent sequence of events and Euell's recollection of these events. I am persuaded here that Euell has candidly, fully and accurately related the sequence of events. Insofar as the testimony of Morrill differs with the testimony of Euell, I credit the testimony of the latter as more complete, detailed and reliable. In addition, insofar as DeRosa's testimony concerning, in effect, his knowledge of the existence of Euell Elevator and his efforts to locate Euell and Euell Elevator differs from the testimony of Euell, I credit the testimony of Euell. DeRosa's testimony was, at times, vague, contradictory, and unclear. In short, although I believe that DeRosa in fact made efforts to locate and speak with Euell, I also believe that Euell and Euell Elevator did not conceal their location or identity and, had DeRosa been more diligent, he would not have encountered his claimed difficulties in finding Euell and Euell's office during the pertinent period.

edged, on February 9, 1981, "for all legal and practical purposes [T.E. Elevator] ceased to exist." About this same time, Internal Revenue Service, as Morrill further explained, "slapped liens" on "all accounts receivable" and "blocked us out of any further contact with those accounts." Later, Euell, after being apprised that T.E. Elevator was "abandoned" and "out of business," formed a new corporation, Euell Elevator; negotiated a new lease for the premises previously occupied by T.E. Elevator; hired new employees; posted a sign on the door identifying this new entity; and notified its customers that it was, in effect, a different and new corporation. As Stamford city purchasing agent Canino credibly testified, the city advised Euell that it "had no relationship with any newly formed Company." The city had previously dealt with T.E. Elevator. Admittedly, Morrill and Tittmann have no economic interest, direct or otherwise, in Euell Elevator. The formation and creation of Euell Elevator will in no way benefit Morrill or Tittmann or T.E. Elevator.

The dissolution of T.E. Elevator and the creation of Euell Elevator, on this record, are clearly not a "mere technical change in the structure or identity of the employing entity"; there has been no attempt shown here "to avoid the effect of labor laws"; there has been, instead, a "substantial change" in the ownership of the two entities. Cf. *Howard Johnson Co. v. Hotel Employees*, above. Morrill and Tittmann, the principal owners of T.E. Elevator, have no economic interest or benefit in Euell Elevator. Indeed, Morrill and Tittmann, if successful in getting Euell to agree to their "plan," would have prevented the formation of this new entity as a potential competitor of T.E. Elevator. In short, Euell Elevator is not an "alter ego" or a "disguised continuance" of T.E. Elevator. It is a new and separate entity.[5]

In sum, I find and conclude here that Respondent Euell Elevator is not an "alter ego" or "disguised continuance" of T.E. Elevator and, therefore, it did not violate Section 8(a)(5) and (1) of the Act as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce as alleged.
2. Charging Party Union is a labor organization as alleged.
3. Respondent has not violated Section 8(a)(5) and (1) of the Act as alleged.
4. The complaint will therefore be dismissed in its entirety.

ORDER[6]

I recommend that the complaint herein be dismissed in its entirety.

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[5] The cases cited by the General Counsel and Charging Party Union, in support of their contention that Euell Elevator is an "alter ego" or "disguised continuance," are plainly inapposite here. Thus, for example, in *Superior Sprinkler, Inc.*, 227 NLRB 204 (1976), the Board found, inter alia, that "the only change that occurred other than [a] described change in bidding for new business is the change in the structure of the business organization." In *All Kind Quilting, Inc.*, 266 NLRB 1186 (1983), the Board stated, in part: "We agree with the Administrative Law Judge's conclusion that 'All Kind has retained all of the right, title and interest in the quilting business, that it alone has assumed the risks and derived the benefits from the quilting business, and that North Side is its alter ego." The Board then added: "In adopting this conclusion, we note that in cases of this nature, we have found that an alter ego relationship existed even though no evidence of actual common ownership was present." In *Crawford Door Sales Co.*, 226 NLRB 1144 (1976), the Board observed:

> In sum, it is apparent that both Respondents at all times material were wholly owned by members of the Cordes family and never lost their character as a closed corporation.

And, in *American Pacific Concrete Pipe Co.*, 262 NLRB 1223, 1226 (1982), the Board noted, inter alia, that "Ampac exercised a degree of control over Dean so as to obliterate any separation between them." Counsel for Respondent argues in his posthearing brief that the unfair labor practice "charge in this case was filed more than 16 months after the Union admits receiving notice of the facts which [it] allege[s] constitute the violation of the Act," and, consequently, this proceeding is barred by Sec. 10(b) of the Act. The General Counsel and the Charging Party argue that the instant charge was filed within the prescribed 6-month period of "actual or constructive" knowledge that the Employer was engaging in unlawful conduct. In view of my recommended disposition of this case, as stated above, it is unnecessary to reach this issue. The General Counsel's motion to correct the transcript is granted.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.